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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 963

CHARLES B. SOLOMON, AVERY TUCKER, MARTIN WESTON and JOSEPH B. MOHR,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Figures in parentheses followed by the letter "a" refer to pages of the Appendix. Other figures refer to Appendix tables unless clearly indicated otherwise.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above cause on April 4, 1960.

I.

OPINIONS BELOW

There was no opinion in the District Court. The opinion of the Court of Appeals has not yet been reported officially. It is printed as Supplement A of this petition, at pp. 17-28.

II.

JURISDICTION

The Court of Appeals affirmed the judgment of the District Court against petitioners on April 4, 1960. On April 22, 1960, petition for rehearing was filed which was denied by order entered May 18, 1960. At the same time the Court of Appeals ordered a stay of mandate for 30 days to enable petitioners to file this petition for writ of certiorari.

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

III.

QUESTIONS PRESENTED

On May 7, 1954, respondent filed its complaint against Charles B. Solomon, Avery Tucker, Martin Weston and Joseph B. Mohr (petitioners) and Max Solomon, Steve J. Marth, Charles Terry and Barry Steel Corporation (this). The complaint charged that in 1946 Tucker, Weston, Mohr and Terry, war veterans, had conspired with Max Solomon and Charles B. Solomon, non-veterans, to obtain from the War Assets Administration surplus steel in violation of the Surplus Property Act of 1944, 58 Stat. 765, 50 U.S.C.A. Appendix 1946 ed.) Section 1635, and that Marth, as an employee of War Assets Administration, had aided and abetted them in accomplishing their purpose (Sat. The complaint also charged that Barry Steel Corporation [illegible] successors to Max Solomon and Charles B. Solomon [illegible]

A short statement of the nature of the case is essential to an understanding of the questions presented.

received the benefits and profits from the sale of the steel involved (54a).

Summons was issued against all defendants except Mohr. It was not until July 19, 1957 that a special order was obtained for service on this defendant. While the suit was pending, Max Solomon, father of Charles B. Solomon, died and the case was dismissed as to him (538a). During this period, too, Barry Steel Corporation underwent reorganization and respondent's claim against it was disposed of in that proceeding. Accordingly, it was dismissed as a party defendant (538a).

Petitioners filed motion to dismiss in the District Court alleging that the complaint failed to state a cause of action, and that the action was barred by the Statute of Limitations and by previous suits instituted by the O.P.A. involving the same stated transactions. The motion was denied (54a). At the trial, Marth, the government employee, and Terry were dismissed at the close of the government's proof (560a). Following the charge of the Court to bring in separate verdicts, the jury returned (54a):

Against Tucker	$ 27,747.46
Against Mohr	51,903.92
Against Weston	62,572.68
Against Charles B. Solomon	142,224.06

Later on motion of respondent (569a) and over objection of petitioners (570a), the District Court changed the verdict and entered judgment as follows (571a):

Against Tucker and Solomon, jointly and severally	$27,747.46
Against Mohr and Solomon, jointly and severally	51,903.92

Against Weston and Solomon, jointly and severally ..... 625[illegible]

By timely motion to vacate judgment and grant a new trial petitioners urged upon the District Court, among other things, that the case had been submitted at the request of government counsel, under the Management and Disposal of Government Property Act of 1949, 63 Stat. 387, 40 U.S.C.A., Sec. 489, instead of under the 1944 Surplus Property Act.

The Court of Appeals affirmed the judgment. Petitioners request for rehearing was denied. Their suggestion for a *en banc* hearing was not formally denied but petitioners were advised by letter from the Clerk of the Court of Appeals that the denial of rehearing included denial of *en banc* hearing because, apparently, of a standing rule of the court that rehearings should not be heard *en banc*. (See copy of letter printed as supplement B of this Petition, p. 29.)

From these facts and further facts to be mentioned, the following questions are presented:

1. Are Section 50 U.S.C.A. Appendix (1946 ed.) Section 1625(b)(2) (the 1944 Surplus Property Act) and 40 U.S.C.A. Section 489(b)(2) (the 1949 Management and Disposal of Government Property Act) so indistinguishable that charging the jury, at the government's request, under the 1949 rather than the 1944 Act did not prejudice the rights of petitioners?[2]

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[2] 50 U.S.C.A. Appendix (1946 ed.) Section 1625(b)(2) is printed as supplement C of this petition, p. 30.

[3] 40 U.S.C.A. Section 489(b)(2) is printed as supplement D of this petition, p. 31.

2. Is an action for recovery of double the amount agreed to be paid under 50 U.S.C.A. Appendix (1946 ed.) Section 1635(b) (2) an action for the recovery of a penalty and therefore barred by 28 U.S.C.A. Section 2462?

3. Was the repeal of 50 U.S.C.A. Appendix (1946 ed.) Section 1635 (the 1944 Surplus Property Act) by 40 U.S.C.A. Section 502 (a) (the 1949 Management and Disposal of Government Property Act) a bar to the present action?

4. Was the government entitled to recover double the amount agreed to be paid, having already received the full purchase price, under 50 U.S.C.A. Appendix (1946 ed.) Section 1635 (b) (2), the 1944 Surplus Property Act?

5. Did the prior O.P.A. cases instituted by the government involving the same parties and the same transactions constitute an election and a bar to the present action?

6. Was it the government's duty to prove that not less than "50%" of the invested capital or net income is owned by or accrues to" the non-veteran defendants to show a violation of the applicable revised certification 130.22, 10 15.4(e) which replaced the earlier certification 130.22, 10 15.4(c) requiring that a non-veteran must have less than a 50% "proprietary interest in the enterprise"?

7. Was the District Court's amendment of the verdict from a separate verdict to a joint and several verdict, and entry of a joint and several judgment thereon, a denial of petitioners' constitutional right to trial by jury under United States Constitution Amendment Seven?

8. Was the Court of Appeal's rejection of petitioner's request for oral hearing as set forth in Supplement B, a compliance with the rule of *Western P. R. Corp. v. Western P. R. Co.*, 345 U.S. 247.

Excerpts from Government's Exhibit 2-A, certification form 130.22, 10 15.4(e) is printed as Supplement E of this petition [illegible]

IV.

STATUTES AND REGULATIONS

1. The Statute on which the complaint was filed is 50 U.S.C.A. Appendix (1946 edn.), Section 1665(b)(2), 1944 Surplus Property Act, Supplement C, p. 30.

2. The statute which the District Court read and charged to the jury is 40 USCA Section 489(b)(2) the 1949 Management and Disposal of Government Property Act, Supplement D, p. 31.

3. Section 502 of the 1949 act repealing the section of the earlier 1944 Surplus Property Act on which the complaint was based, so far as here material, reads:

> "There are hereby repealed (1) The Surplus Property Act of 1944, as amended (except Sections 13(d), 13(g), 13(h), 23 and 32(b)(2), and Sections 501 and 502 of Reorganization Plan number 1 of 1947 * * *."

4. The certification (RO 22, 11-15-45) under the revised regulations (SPA Reg. 7, dated October 16, 1945, 6[illegible] pursuant to which the steel premiums were here made, set forth, so far as here material in Supplement E.

V.

CONCISE STATEMENT OF THE CASE

The facts are sufficiently set forth under "Questions Presented" with the following additions. The petitioners denied any wrongdoing, insisting that they had acted as Government operators, and had received the full share of the profit on their sales (12a, 350a, 476a). In fact O.P.A. thought they had received too much, and filed claims against them for the overpayments. These were settled

and compromised. Weston paid O.P.A. about $350,000 (459a). Tucker settled his claim, which was for $202.91, with O.P.A. (513a). The total profit received by the veterans was less than $3,000,000 (475a, 271a, 413a). Yet they are saddled with a liability of over $112,500,000.

VI.

REASONS FOR GRANTING THE WRIT

A. In 1949 Congress passed a general Management and Disposal of Government Property Act, 63 Stat. 378, 40 U.S.C.A. Section 471, *et seq.* Its purpose was to eliminate the narrow, inefficient administration of surplus property under the 1944 Act and to establish in its place a comprehensive governmental procedure for dealing with surplus and excess property generally, not merely war-generated surplus. Accordingly, the earlier act was for the most part repealed including that section which provided for recovery by the government. Bearing out the *Congressional Intent*, the preface of the new act contains reference to Acts under *this Chapter*.

The nature and extent of the government's rights under the 1944 act, 50 U.S.C.A. Appendix (1946 ed.) section 1635 (b), and under the 1949 act, 40 U.S.C.A. Section 484 (b), and the effect upon liabilities incurred under the former act sought to be enforced after its repeal have raised grave questions. So far as we have been able to discover the issues here raised by petitioners, except that of the statute of limitations, have not been the subject of reported cases. Because of the widespread application of these statutes to many cases which are no doubt now pending and will be pending in the federal courts, this court should now determine and resolve the respective rights of the various parties.

1. Can a charge under the 1949 Act sustain a judgment for acts committed under the 1944 Act? The 1949 Act broadened the scope of liability to include conspiracies in connection with the procurement, transfer or disposition of government property (Supplement D, p. 3[illegible], while the 1944 Act was limited to conspiracies in connection with disposition only (Supplement C, p. 30[illegible]. The added words must have added additional obligations. *Union Pacific R.R. Co.*, 99 U. S. 3[illegible]. It is impossible to say that the jury may not have found petitioners guilty of conspiracy in connection with procurement or transfer. The possibility that they might have arrived at a different conclusion had they been charged only as to disposition cannot be overlooked. Every doubt should be resolved in favor of petitioners to insure a fair trial on the issues of the case.

Whether petitioners failed to call this to the attention of the trial judge at the moment, is, in case of such fundamental error of no consequence: *Mandel Bros. v. Stix* (C.C.A. 8) 125 F. (2d) 6[illegible]; *Trenge v. Chicago D. & Trust Co.* (C.C.A. 2) 2[illegible] F. (2d) 2[illegible]; *Sandler v. Electric Corporation* (C.C.A. 4) 172 F. (2d) 5[illegible]; *particularly in view of the fact that the 1949 Act was a complete change upon the trial court's and defendants' counsel* (R. 2[illegible]).

2. The Court of Appeals disposed of petitioners' contention that the present action was for a penalty and not for liquidated damages on the authority of *[illegible] Iron & Steel Co.*, 279 U. S. [illegible], and *Kelly v. United States*, 279 U. S. 3[illegible]. It is pointed out that in those cases suits were brought under subsection (b) (1) for $2,000 damages for each transaction, while the present action was under subsection (b) (2). As pointed out in *Re v. Trojan*, there must be a reasonable relation between actual damages difficult of proof and $2,000.00 as liquidated damages [illegible]

Footnote 1 and 2 [illegible] Justices Stewart, Douglas and [illegible] dissenting in part.

what conceivable relation can there be between the price paid and double that amount again, $11,222,196, as liquidated damages. It is inconceivable that, without any proof of actual damage, such a tremendous sum can anywhere near approximate any damage respondent may have suffered. We further stress that this record is barren of any claim or proof that the price paid for the surplus property obtained was not the fair value fixed and received by the Disposal Agency for the Government. To impose the measure of damages as urged unquestionably violates every expressed theory of liquidated damages.

In *Gamble v. United States* (C. Cl.) 152 F. Supp. 78, the Court considered Rex Trailer on which Kolber was decided and held that the addition of 25% of the amount fraudulently claimed was a penalty. It said (84):

> "This Court in *Erie Basin Metal Products v. United States*, Ct. Cl., 150 F. Supp. 561, had occasion to determine the applicability of 28 U. S. C. Section 2862 to counter-claims pursuant to section 19 of the Contract Settlement Act. In Erie Basin the Court rejected the Government's contention that recoveries under Section 19 were in the nature of liquidated damages and held they were civil penalties subject to the limitation imposed by 28 U. S. C. Sec. 2862."

Specifically cited by the dissent in Kolber:

United States ex rel. Marcus v. Hess, 317 U. S. 537;

Pirie et Sons v. United States, 302 U. S. 407.

It is to be noted that as to petitioner Mohr no summons was issued until 1957 (see calendar entry) at which time respondent obtained a special order for service upon him. This was more than 10 years after the event. Merely filing

suit without good faith effort to serve process does not toll the Statute of Limitations. *Lau and Lau, Trading Co. v. United States*, 251 U. S. 574; *Johnson v. Hughes* (1945), 10 C. Mich. 4 F.R.D. 119.

3. The Court of Appeals interpreted Section 2 (b) to allow recovery of twice the amount paid for the goods in addition to the original price paid. We think this ignores the intent of Congress. Sections 2(b)(1) and (2) clearly apply to executed contracts. Section 2(b)(3) does, and by its very wording, does apply to executory contracts, i.e. where the purchase price has not yet been paid but agreed to be given. Only by this construction can the various alternative remedies be consistent.

The present holding of the Court of Appeals could be a government, *without any proof of damages*, whatsoever, arbitrarily to exact a 200% gain.

4. It is conceded that under the revised regulation (SPA Reg. 7, dated October 10, 1945) the petitioner veterans had the right to resell the goods purchased at ceiling prices. Under the earlier certification rule (RO 22, 15 (3)) a non-veteran had no right to participate with veterans; such non-veteran had a "proprietary interest in the enterprise" which did not exceed 50% of the invested capital or gross income. However, under the revised certification (RO 22, 11-15-45) (Supplement E, p. 22) which all of the petitioner-veterans purchased the proprietary interest was clarified. A non-veteran could now participate as long as less than 50% of the invested capital or net income is owned or controlled by such non-veteran.

It is evident, therefore, that while under the former certification the non-veteran's participation in the veteran's enterprise had to be a "proprietary interest", albeit less than 50%, under the latter certification applicable here he did not have to have a proprietary interest. He could

for example, with proprietary patents advance funds and cooperate with him so long as he received less than 50% of the net profit.

It was respondent's burden, then, in order to bring petitioners under the prohibition of the law to prove that such non-voters had 50% or more of the invested capital, or were receiving 50% or more of the net profit. There was no evidence of either.

We think this was an extremely vital point which the Court of Appeals completely ignored.

B. The decision of the Court of Appeals is, we believe, in conflict, at least in principle, with decisions of this court and other federal courts.

1. The Court of Appeals overcame petitioner's contention that the 1944 Act had been repealed by relying upon the general saving statute, 1 U.S.C.A. Section 109. But this court said in *Great Northern R. Co. v. United States*, 277 U. S. 172, 185:

> "As the section of Revised Statutes in question has only the force of a statute, its provisions cannot destroy a dis regard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment."

See *Alaska Ass'n. Am. Can Company* (D. C. Alaska) 137 F. Supp. 181;

Wilmington Trust Co. v. United States (D. C. Del.) 28 F. (2d) 208.

Here we have in the 1939 Act an express repeal of the section relied upon by respondent with a saving clause as to certain other sections of the 1944 Act. It is an established rule of statutory construction that an exception from the repeal is legislative expression of intent to save only those

sections and non-ferrous. *Hecht v. Pitts. & Conn. Coal Co.*, supra; *Hecht v. Bowles*, 321 U.S. 321, 329.

2. In 1947, respondent through its O.P.A. filed suit in the same District Court against petitioner Weston (discharging him as "connected with the business of buying and selling" steel and having overcharged $200 [illegible]). The case was settled by Weston by payment of about $1,000. About the same time a similar action was instituted against petitioner Tucker who also settled his case for $1,000. Both cases involved the identical steel transactions now involved and claimed overcharges on their sales to Barry Steel. Yet now the respondent inconsistently says that Weston and Tucker were not in the steel business, did not make sales to Barry, but were merely its agents. Petitioners claim based upon *United States v. Ocean Leather Co.*, 200 U.S. 250 and *United States v. Lehigh*, 282 U.S. 505, that respondent had made irrevocable election and conclusively barred by the earlier settlements. *Lee Estates v. Chicago*, 102 U.S. 668; is established by the Court of Appeals.

The reason given was that the respondent did not knowingly make a choice. As the record [illegible] that respondent's investigator made his investigation [illegible] August 31 to Sept. when he returned his report to [illegible] and sent it to the central office in Washington [illegible]. At that time it was not aware of the [illegible] made by the various parties involved. The O.P.A. was misled in 1947.

The Court of Appeals accepted the unbelievable explanation of how it might be that respondent did not know.

3. When the District Court [illegible] charged the jury [illegible] the liability of the petitioners as corporate officers [illegible] specifically directed them to bring in separate verdicts as to the three defendant veterans and the [illegible] non-veteran defendants. On the jury's request for [illegible] instructions he again emphasized that they must [illegible]

[illegible] verdicts as to each of the four [illegible] Court [illegible] with the specific direction of the judge, the jury [illegible]

Against Tucker	$ [illegible]
Against Mabry	[illegible]
Against Weston	[illegible]
Against Charles B. Solomon	[illegible]
[illegible]	[illegible]

[illegible] petitioner's objections to the verdicts and proposed [illegible] of separate judgments, petitioner contended that it was not entitled to judgment in that amount, that his original prayer was for around $[illegible] with Terry [illegible] and with him out the amount would [illegible] [illegible] He further stated (fn. [illegible]):

> "Now, when we got through to the judgment and the verdicts, it is my theory that we could not, according to my understanding of it, get a judgment greater than the amount we asked for."

Having [illegible] verdicts [illegible] excessive to [illegible] the trial court should have set aside the verdicts or [illegible] ordered a remittitur accordingly which would [illegible] as follows:

Against Tucker	$[illegible]
Against Mabry	[illegible]
Against Weston	[illegible]
Against Charles B. Solomon	[illegible]

[illegible] was entered [illegible] The [illegible] [illegible] was entered [illegible] Accordingly [illegible] was [illegible]

But instead of this the trial judge and government counsel changed the separate verdicts of the jury into joint and several verdicts thus:

Against Tucker and Solomon, jointly and severally	$27,[illegible]
Against Mohr and Solomon, jointly and severally	51,[illegible]
Against Weston and Solomon, jointly and severally	62,[illegible]

The Court of Appeals brushed aside petitioner's contention that this was prejudicial error by reliance upon Rule 61, Rules of Civil Procedure. That there was no harm done. But the court has overlooked the fact that each petitioner, under a properly remitted verdict would have been liable for but one half of the amount in which he now stands charged.

We think, too, that the trial judge by the totally inconsistent amendment, has effectively deprived these petitioners of the right to have their liability determined by the jury. United States Constitution, Amendments Seventh. Rule 61 has never been considered a cure all and is not intended to deprive a litigant of his substantial rights. *Woodall v. Great American Indemnity Co.*, (C.C.A. 5) 146 F. (2d) 797.

While it is true that in some instances judges may correct the jury's verdict in matters of form or to conform to the jury's intent (properly expressed, 58 A. L. R. 220-224), it has never been held that the judge has a right to substitute his verdict for the jury's. Here the jury's intent was to bring in separate verdicts, as it did because it was specially instructed to do so. (552a, 565a

it did not intend to do otherwise, i.e. bring in joint and several verdicts.

> "The judge cannot, under the guise of amending the verdict, invade the province of the jury or substitute his verdict for theirs. After the amendment the verdict must be not what the judge thinks it ought to have been, but what the jury intended it to be. Their actual intent, and not his notion of what they ought to have intended, is the thing that must be expressed and worked out by the amendment." 56 A.L.R. 2d 220 221.

Here the jury, complying with the court's repeated erroneous instructions (555a, 562a), intentionally brought in separate verdicts totalling four times the amount already paid without any proof whatsoever of actual damage. The judge compounded the error by overriding the jury's intention and substituted his own verdict by the joint and several modification.

We thus have the anomaly of the case being submitted to the jury at the insistence of government counsel and instructions of the trial judge on the theory of separate verdicts and a return by the jury of separate verdicts in an amount in excess of even the government's claim. Then in a desperate effort to save such a dubious verdict we now find government counsel inconsistently urging upon the court that the verdict should now be joint and several instead of separate, an urging accepted by the trial judge (555a).

To finally establish invasion of the jury's function we find the Court, after directing the jury to return separate

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"Mr. Wolfe: I entered it is that the separate judgments is lawful. It is lawful. I may protect it on appeal. But I was asking for less [illegible] as what I was saying." (562a).

verdicts (552a) consenting to a change in such verdicts by stubbornly clinging to his considered theory of liability and damages, and we quote "although I do feel, under strict interpretation of the language of the statute, that judgments could very well be entered upon the verdict as returned by the jury, in the amounts I have mentioned, against the veteran defendants, plus a further amount equal to the sum of those three figures against the defendant Solomon. In any event, I will enter the judgments accordingly" (568a).

Cf. *Ohio Valley Bank v. Greenbaum Sons Bank & T. Co.* (C.C.A. 4) 11 F. (2d) 87.

C. Petitioner's suggestion to the court of appeals that their petition for rehearing *en banc* was disposed of as noted in letter to counsel from the clerk, copy of which is attached as supplement B. We do not feel that the consideration thus given petitioner's request was in compliance with *Western P. R. Corp. v. Western P. R. Co.*, 345 U. S. 247.

CONCLUSIONS

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted.

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SUPPLEMENT A

No. 13953

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

CHARLES B. SOLOMON, AVERY TUCKER, MARTIN WESTON and JOSEPH B. MOHR, *Appellants*, v. UNITED STATES OF AMERICA, *Appellee*.	Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided April 4, 1969.

Before: Simons, Senior Circuit Judge, Miller and Cecil, Circuit Judges.

Miller, Circuit Judge. The appellee, United States of America, filed this action in the District Court against Max Solomon, his son Charles B. Solomon, Steve J. Martin, Avery Tucker, Martin Weston, Joseph B. Mohr, Charles Terry, and Barry Steel Corporation. The complaint alleged that in 1946 Tucker, Wesley, Mohr and Terry, who were war veterans, conspired with Max Solomon and Charles B. Solomon, who were non veterans, to obtain from the War Assets Administration surplus steel in violation of the Surplus Property Act of 1944, 58 *Stat.* 765, 50 *U. S. C. App. Appendix, Pg. 1 Edition, Sections 1611 through 1646.* It was also alleged that Martin, as an employee of the War Assets Administration, had aided and abetted them in accom-

plishing their purpose, and that Barry Steel Corporation received the benefits and the profits from the sale of the steel involved. While the action was pending Max Simon died and the Barry Steel Corporation underwent reorganization and the Government's claim against them was dismissed. At the close of the Government's evidence the District Judge directed verdicts in favor of the defendants Terry and March. At the conclusion of the trial the jury returned verdicts against the remaining four defendants, upon which verdicts judgments were rendered, followed by this appeal.

Section 26 (b) of the Surplus Property Act of 1944, Section 1635 (b), Title 50, Appx. U. S. C. 1944 Edition, provides as follows:

"(b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent device, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act (such sections); or who enters into an agreement, combination, or conspiracy to do any of the foregoing

"(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or

"(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

"(3) shall, if the United States shall so elect, return to the United States the property thus secured and obtained and the United States shall return as liquidated damages any consideration given to the United States or any Government agency for such property."

In the present case the Government elected to claim damages under Section 26 (b)(2).

The following brief review of the Government's evidence is sufficient to show the facts upon which the Government relies and to present the issues involved on this appeal. Appellants Tucker, Mohr and Weston were honorably discharged veterans who qualified for a priority status under the Disposal Program. Max Solomon and Charles Solomon, who were non-veterans, were in the business of purchasing steel under the partnership name of Barry Products, which partnership was later incorporated under the name of Barry Steel Products, Inc. They were not entitled to a priority status. Each of these veterans made written application to the War Assets Administration for the purchase of steel under their priority status. The applications were typed in the office of Max and Charles Solomon by the secretary for the Solomons. The information for those applications were furnished by the Solomons. The Solomons paid to each veteran the amount of money which the veteran had agreed to pay for the steel. Each veteran, after receiving this money from the Solomons, paid for the steel by his own check. The Solomons received no note or security for the payment of this money to the veterans. The price paid for the purchase of steel under these applications was:

Tucker	$13,877.73
Weston	31,286.31
Mohr	25,951.96

None of the veterans was in the steel business, nor did any veteran have any warehouse facilities. The applications contained false statements with respect to the steel business in which each applicant stated he was engaged. At least in the cases of Tucker and Weston, the veterans did not see or inspect the steel so purchased. The veterans had nothing to do with the shipping instructions and the steel so purchased was shipped direct to the Solomons according to Solomon's instructions. The veterans did

ther engage in the steel business after making the purchases involved in this action.

It is admitted by the Government that the veterans were lawfully entitled to a priority status in the purchase of surplus steel in question and after purchasing it had a right to resell it instead of using it. It is contended, however, that the purchases in the present case were not purchases by the veterans, but actually were purchases by the Solomons through fraudulent use of the priority rights of the veterans.

Evidence was introduced on behalf of the appellants that the purchases by them were bona fide transactions; that the steel so purchased was resold by them to the Solomons before they paid for it, and that the steel was transferred to them by the Solomons before they paid for it; that their purchases were advance payments by the Solomons to the veterans on account of the resale of the steel and not payments by the Solomons to the Government.

The question presented by the evidence was whether the veteran involved in each transaction under consideration conspired with the Solomons to engage in a fraudulent scheme or device for the purpose of enabling the Solomons to obtain surplus steel from the Government on a priority basis, which is a violation of law under the Surplus Property Act 1944, by the non-veterans, who are not entitled to such priority basis.

Appellants' first contention is that the evidence was insufficient to take the case to the jury on the issue of fraud and that the Court erred in not sustaining the motions for directed verdicts in favor of each of the defendants, instead of in favor of only Berry and Martin.

Although the Government's evidence was entitled to some relevance, it is well settled that upon a motion of a defendant for a directed verdict, the trial judge will not overrule the motion unless, viewing the evidence in the light most favorable to the plaintiff, there would be no substantial evidence to support a jury verdict if returned in him. *Heaton v. Bond Office Equip. Co.*, 188 F. (2d) 121, 123,

C. A. 6th; *Scott v. United States*, 161 F. (2d) 1009, 1012, C. A. 6th.

Applying the rule to the evidence in the present case, we are of the opinion the District Judge properly overruled appellants' motions for directed verdicts.

Various other questions have also been raised by the appellants, which will be considered in turn.

The complaint, which was filed May 7, 1954, alleges that the appellants committed the acts complained of in March and April, 1946. Appellants contend that the action was barred by Section 2462, Title 28, U. S. Code, which provides that an action "for the enforcement of any civil fine, penalty, or forfeiture, pecuniary, or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." The action was not brought until more than eight years after the alleged cause of action accrued. In *United States v. Witherspoon*, 211 F. (2) 858, C. A. 6th, this Court held that an action under Section 26 (b) (1) of the Surplus Property Act of 1944 was an action for penalties to which Section 2462, Title 28, U. S. Code, was applicable. However, the Supreme Court in *Rex Trailer Co. v. United States*, 350 U. S. 148, later held that such an action was a civil remedy in the nature of liquidated damages and was not a criminal penalty. Based upon this ruling, the Court of Appeals for the Third Circuit and the Supreme Court held in *United States v. Keller*, 255 F. (2) 805, C. A. 3rd, affirmed *sub nom. Keller v. United States*, 359 U. S. 300, that a suit for damages under Section 26 (b) (1) of the Surplus Property Act of 1944 was not a suit to enforce a fine or penalty and therefore was not subject to the five year limitation of Section 2462, Title 28, U. S. Code. See also: *United States v. Hoar*, 207 F. (2d) 730, 738, C. A. 5th.

Appellants attempt to avoid the effect of this ruling by pointing out that the ruling involved an action brought under Section 26 (b) (1) of the Act and is not applicable to the present action which was brought under Section 26 (b) (2) of the Act. They contend that the reasoning

of this Court's opinion in *Lee v. United States*, [illegible] case, 211 F. (2d) 478, C. A. 6th, is very much in point. In this Court is now called upon to construe Section 26 (b) of the Act, which is materially different from Section 26 (b) (1) and which has not yet been construed by any reported federal case. We find no merit in the claimed distinction between the two sections. In *Reconstruction Finance Corporation v. Bankers Trust Co.*, 318 U. S. 163, at pages 170-172, the Supreme Court said with respect to the three alternative remedies provided by Section 26 (b), subsections 1, 2 and 3: "All three were recognized as civil remedies by Congress before the bill was passed, and the conclusion is inescapable that each was of the same nature and designed to serve the same purpose."

The Surplus Property Act of 1944 was for the most part repealed by the Federal Property and Administrative Services Act of 1949. *See* 63 Stat. 377, Title 40, U. S. C. Section 26 of the 1944 Act, under which the present action was brought in 1954, was one of the sections so repealed. Including so, the 1949 Act substantially reenacted with a change in wording, the civil remedies previously provided by Section 26 of the 1944 Act. *See* 63 Stat. 395, Title 50, U. S. Code. We are not by appellants' contention that the rights and remedies provided by Section 26 of the 1944 Act were cancelled and extinguished by the repealing Act of 1949, which was enacted prior to the filing of the present action. This contention fails to consider the general savings statutes, now carried as Section 109, Title 1, U. S. Code. Under the provisions of that section, Section 26 of the 1944 Act survived as remaining in force for the purpose of sustaining a proper action for the enforcement of any liability thereunder. *See Lee v. United States*, [illegible] 211 F. (2d) 478, C. A. 6th; *Reconstruction Finance Corporation v. Bankers Trust Co.*, 318 U. S. 163, 170-172; *Reconstruction Finance Corporation v. Prudence Securities Advisory Group*, 332 U. S. 380, 382-383; *United States v. Hall*, 107 F. Supp. 948, N. D. Miss., reversed on other grounds, 207 F. (2d) 5, C. A. 5th.

One of the defendants named in this action was Stanley Mosk, who during 1945 and 1946 was employed by the Reconstruction Finance Corporation and the War Assets

We are of the opinion that appellants' argument misconstrues the nature of the action. The statute is directed at a conspiracy "for the purpose of securing or obtaining . . . for any person any . . . property, or other benefits from the United States or any Government agency, *in connection with* the disposition of property under this Act". (Emphasis added.) The illegal conspiracy was not one to dispose of government property. It was a conspiracy to *obtain* government property *in connection with* its disposition by the Government under the Act. The Government was disposing of its surplus personal property, notwithstanding the fact that one of its employees was not engaged in the conspiracy. The complaint charged each of three veteran appellants with conspiring with appellant Charles Solomon to acquire certain surplus government property which was being sold by the War Assets Administration, a governmental agency, at Detroit, Michigan, between March 4 and May 30, 1946, inclusive. We find nothing in the statute which requires the conspiracy to be with a government agent or employee. The District Judge properly overruled the motion for a new trial based on this question of law.

This action sought damages under option 2 of Section 26 (b) of the 1944 Act, which provides that "Every person who . . . enters into an agreement, combination or conspiracy" to engage in any fraudulent trick or device for the purpose of obtaining property from any Government agency in connection with the disposition of property under the Act, shall "pay to the United States as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency." Appellants contend that as to the veteran, judgment could not go against both the veteran and Solomon because (a) the veteran was the "person" who agreed to give the consideration to Solomon, the "agent", but both the veteran and Solomon were "such person" as defined in the Act. This argument [illegible] consent of a principal may [illegible] the act of his agent [illegible] legally treated as [illegible]

Kimball, 296 U. S. 140, 165; *Standard Oil Co. of Cal. v. Moore*, 251 F. (2d) 188, 211, C. A. 9th, cert. denied, 356 U. S. 975. Appellants' further contention that since consideration has been paid the amount so paid should be set off against the liquidated damages of "twice the consideration agreed to be given" finds no support in the language of the statute, and is accordingly rejected.

In 1947 the Government through its Office of Price Administration filed complaints against appellants Weston and Tucker claiming overcharges in the sale of steel by them to Barry Steel Products. This was the same steel involved in the present action. The claims were settled by payments of small amounts by Weston and Tucker. Appellants claim that these O. P. A. suits were based on the contention that Weston and Tucker were the owners of the steel and that Barry Steel Products had purchased it from them, which position is inconsistent with the Government's contention in the present case that the steel was not purchased or owned by these appellants, but was in fact purchased from the Government agency by the Subgroup. Appellants contend that the filing and prosecution of the O. P. A. cases constituted an election by the Government which is binding upon it and bars the prosecution of the present action arising out of the same facts. Election of remedies is a well recognized principle of law, but, in order to be applicable, certain facts must exist, one of which is that there must be a choice, knowingly made, between two inconsistent rights, either of which may be asserted at the will of the chooser. If, through a mistake of material fact or law, alternative remedies are not known to be available, the election of what later develops to be an inappropriate remedy is not a matter of election which will bar the party from later asserting the correct remedy which is [illegible] *Gallagher v. United States*, 227 F. (2d) [illegible] C. A. 9th; *Pacific Coast Coal Co. v. Commissioner of Internal Revenue*, 103 F. (2d) 209, 213, C. A. 9th; *Stone & Webster Eng. Corp. v. First National Bank*, 345 U. S. 330, 342-347; *Crocker Co. v. Lucas*, 59 F. (2d) 276, 278-279, C. A. 9th; *Rosenstiel v. United States*, 206 F. (2d) 697, 705-706, C. A. 10th. The fact that the O. P. A. suits under the circumstances here

existing did not constitute an election of remedies by the Government which would bar its later prosecution of the present action.

The jury, under instructions by the Court, found separate verdicts against each of the four appellants as follows: Tucker $27,747.46; Moore $51,290.92; Weston $62,372.08; Solomon $114,224.06. These amounts were the sum of each veteran's share of the amount of the commutation passing from the purchaser to the government. Thereafter, the Court entered judgments as follows: $27,747.46 jointly and severally against Tucker and Weston; $51,290.92 jointly and severally against Moore and Solomon; and $62,372.08 jointly and severally against Weston and Solomon.

Appellants contend that the Court erred in instructing the jury to return separate verdicts, in that conspirators are liable jointly and severally, if at all, and not separately. They also contend that after separate verdicts were returned, the Court was without authority to enter separate judgments and that such action was a substantial alteration of the jury's verdict. We find no merit in these contentions and

It is well settled that the liability of conspirators is joint and several. Liability, *Lawrence v. Lawrence*, 57 F. (2d) 465, 466, C. A. 10th; *Interstate Oil Pipe Line Co. v. Stanolind Pipe Line Co.*, 180 F. (2d) 190, C. A. 5th, affirmed, 341 U. S. 342; *Continental Casualty Co. v. Tri-State Coach Co.*, 157 F. (2d) 545, C. A. 10th. But the separate verdicts were not inconsistent with the principle of law. Under Rule 49(a), Rules of Civil Procedure, the trial judge is authorized to submit to the jury special findings of fact which may be necessary to enable the jury to render a general verdict under the pleadings and evidence. The instructions with explanation and instructions concerning the separate verdicts may be necessary to enable the jury to make its findings of fact on the stated issues. The separate verdicts in this case are not findings of fact at all. They do not constitute the basis of the decree. The trial judge has the responsibility of mak-

that liability on the part of the appellant Solomon did not exist in the absence of liability on the part of the part[illegible] certain appellant with whom it was charged he conspired, and that the question of damages with respect to the liability of each appellant was correctly presented. [illegible] objections were not made to the Court's charge at the time it was given and our review is accordingly so limited. *Rule 51, Rules of Civil Procedure.*

The judgments are affirmed.

SUPPLEMENT B

Office of the Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Cincinnati 2, Ohio

Carl W. Reuss
Clerk

May 29, 1959

Mr. George Stone
2550 Guardian Building
Detroit 26, Michigan

Re: Charles B. Solomon, et al. v. United States of America – No. 13,953

Dear Mr. Stone:

Copies of your recent letter were distributed to the Court and I am directed to advise you that the denial of the petition for rehearing in this case included a denial of a rehearing en banc.

I am further directed to call your attention to the rule heretofore laid down by this Court that in cases where the appeal was heard and the judgment or order complained of was decided by a regular court consisting of three judges, a petition to rehear should not be considered by the court en banc. *National Labor Relations Board v. Cambria Clay Products Co.*, 229 F. (2) 433, C. A. 6th; *Northwest Airlines, Inc. v. Glenn L. Martin Co.*, 229 F. (2) 433, C. A. 6th; *Michigan Consolidated Gas Co. v. Packwell Victory Products Co.*, 226 F. (2) 60, 72 C. A. 6th; *National Bank of Detroit v. Wayne Oakland Bank*, 252 F. (2) 537, 544, C. A. 6th.

Yours very truly,

Carl W. Reuss

Carl W. Reuss, Clerk

CWR:mmd

SUPPLEMENT C

SURPLUS PROPERTY ACT OF 1944. 58 STAT. 765. 50 U. S. C. A. APPENDIX (1946 Ed.) SEC. 1635(b)

(b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device, for the purpose of securing or obtaining or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination, or conspiracy to do any of the foregoing -

(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as liquidated damages any consideration given to the United States or any Government agency for such property.

SUPPLEMENT D

MANAGEMENT AND DISPOSAL OF GOVERNMENT PROPERTY ACT OF 1949, 40 U. S. C. A., SEC. 489(b)

"(b) Every person who shall use or engage in, or cause to be used or engaged in, or enter into an agreement, combination, or conspiracy to use or engage in or to cause to be used or engaged in, any fraudulent, trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any federal agency in connection with the procurement, transfer, or disposition of property under this chapter, chapter IIB of Title 5, chapter 4 of Title 41, and chapter 11 of Title 44—

(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damages which the United States may have sustained by reason thereof, together with the cost of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by the United States or any Federal agency to such person or by such person to the United States or any Federal agency, as the case may be; or

(3) shall, if the United States shall so elect, restore to the United States, the money or property that was secured and obtained and the United States shall retain as liquidated damages any property, money, or other consideration given to the United States or any Federal agency for such money or property, as the case may be.

SUPPLEMENT E

Excerpt from Pltf's. Ex. 2-A, page 635a

RO-22
Revised
11-15-45

SMALLER WAR PLANTS CORPORATION
REGIONAL OFFICE—711 BOULEVARD BUILDING
DETROIT 2, MICHIGAN

REVISED CERTIFICATION BY VETERAN APPLICANTS TO BE ATTACHED TO ALL FORM 66 APPLICATIONS

(NOTE:—These are to be used until the new Form 66 is received. The certification on the back of the present Form 66 is not to be used.)

I hereby certify (1) that all of the foregoing statements are true to the best of my knowledge and belief; (2) that I served in the active military or naval services of the United States on, or after, September 16, 1940, and prior to the termination of World War II, and was discharged or released therefrom under honorable conditions; (3) that the enterprise described herein is one of which more than fifty (50) percent of the invested capital or net income thereof is owned by, or accrues to me, or other veterans, and that less than 50% of the invested capital or net income is owned by or accrues to non-veterans or that the property described herein is required as a condition of my employment by others; (4) I hereby certify that the surplus property herein applied for is to be used in and as part of the enterprise described herein; (5) I also certify that the surplus property for resale, if any, if applied for, is an initial stock, necessary, within reasonable limits, for

enterprise; (6) I further certify that I have not heretofore applied for or received any surplus property, under the veterans' preference except at the following Smaller War Plants Corporation's offices:

.....

.....

Moler Steel Co.
s/ Joseph B. Moler
(Signature of applicant)

Date 3-27-46

FILE COPY

Supreme Court, U.S.
FILED
JUL 8 1960
JAMES R. BROWNING, Clerk

No. 133

In the Supreme Court of the United States

OCTOBER TERM, 1960

CHARLES B. SOLOMON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
MORTON HOLLANDER,
ANTHONY L. MONDELLO,
Attorneys,
Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 138

CHARLES B. SOLOMON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the district court. The opinion of the Court of Appeals (Pet. 17-28) is reported at 276 F. 2d 660.

JURISDICTION

The judgment of the Court of Appeals was entered on April 4, 1960. A timely petition for rehearing was denied on May 13, 1960. The petition for a writ of certiorari was filed on June 8, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' failure to object to certain portions of the district court's charge to the jury

precluded them from raising those objections before the Court of Appeals.

2. Whether the court below correctly affirmed the district court's application of settled principles of joint and several liability for conspiracy to the special jury findings in this case.

3. Whether the five-year statute of limitations in 28 U.S.C. 2462 applies to suits under Section 26(b)(2) of the Surplus Property Act, which permits the United States to recover, as liquidated damages, a sum equal to twice the consideration agreed upon in a surplus property sale.

4. Whether petitioners were entitled in the Court of Appeals to have their petition for rehearing *en banc* considered by that court *en banc*.

STATUTES INVOLVED

Section 26 of the Surplus Property Act of 1944, 58 Stat. 765, 780, 50 U.S.C. App. (1946 ed.) 1635, provides in pertinent part as follows:

> "(b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination, or conspiracy to do any of the foregoing—
>
> (1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States

may have sustained by reason thereof, together with the cost of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained, and the United States shall return as liquidated damages any consideration given to the United States or any Government agency for such property.

Section 209 of the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, 392, 40 U.S.C. 489, provides in pertinent part as follows:

(b) Every person who shall use or engage in, or cause to be used or engaged in, or enter into an agreement, combination, or conspiracy to use or engage in or to cause to be used or engaged in, any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Federal agency in connection with the procurement, transfer, or disposition of property hereunder

(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the cost of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed

to be given by the United States or any Federal agency to such person or by such person to the United States or any Federal agency, as the case may be; or

(3) shall, if the United States shall so elect, restore to the United States the money or property thus secured and obtained and the United States shall retain as liquidated damages any property, money, or other consideration given to the United States or any Federal agency for such money or property, as the case may be.

Section 2462, Title 28, United States Code, 62 Stat. 974, provides as follows:

Time for commencing proceedings

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced with five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

STATEMENT

The United States filed this suit to recover civil damages from petitioners for violation of Section 26 of the Surplus Property Act of 1944 (58 Stat. 765, 50 U.S.C. App. (1946 Ed.) 1636). The complaint alleged that petitioner Solomon conspired with veterans he used as front men to purchase for

"R." references are to the pages of the two volume Appendix for Appellants, filed as a printed record in the court below.

him, with the use of veterans' priority certificates, surplus Government steel to which he was not otherwise entitled (R. 6a–7a). The essence of the fraud lay in the veterans' certifications that they were in the steel business and required the surplus property for use in that business, when in fact they were not in that business, but were solely agents for Solomon in the purchase of the steel. Solomon provided the funds (R. 417a, 418a; 436a, 448a; 460a) issued shipping instructions, and resold the steel. The veterans had no warehouse facilities (R. 412a, 445a, 477a), did not inspect the property (R. 420a, 454a), did not have anything to do with its shipment (R. 420a–421a), and except for these transactions were not engaged in the steel business (R. 430a, 444a–446a, 464a–465a).

The case was tried to a jury which returned verdicts against petitioners. The jury was charged that if it found a conspiracy to violate the Act, if the veterans' applications for property were false, and if petitioners' real intention was that the veterans' business enterprises were mere shams or fictions used for the purpose of obtaining the property for Solomon, it should award a sum against each defendant equal to twice the amount paid by him for the property (R. 538a–544a). No objection was made to the charge (R. 549a–551a).

The jury returned its verdicts in favor of the Government and against the individual petitioners as follows (R. 552a–556a):

Tinnet	$
Mon	
Westo	
Solom	

The awards against Tucker, Mohr and Weston (the veterans) are double the amount paid by each of them for the particular surplus property that he purchased (R. 413a, 430a, 443a, 447a, 458a, 355a–362a). The award against Solomon is the total of the three preceding awards. Judgment was subsequently entered jointly and severally against each of the veterans and Solomon as follows (R. 571a):

Tucker and Solomon	$27,747.36
Mohr and Solomon	51,903.92
Weston and Solomon	62,572.68

The Court of Appeals unanimously affirmed. In a comprehensive opinion which discusses most of the questions raised by petitioners here, the court held that there was substantial evidence to support the jury verdict and the district court's judgment, and that each of the errors reasserted here as to the district court's handling of the case was lacking in merit.

ARGUMENT

All of petitioners' contentions here were either fully considered and rejected by the Court of Appeals, or were deemed by that court not properly before it. These rulings were clearly correct. In any event, the numerous issues which petitioners raise do not warrant review by this Court, since the alleged errors relate only to this particular case, and do not present any questions of general importance.

1. THE CHARGE TO THE JURY UNDER THE 1949 ACT

Petitioners claim error in the district court's charge to the jury on the ground that the court read from

the 1949 version of Section 26 of the Surplus Property Act, rather than from the 1944 formulation of that Section. But since petitioners did not object to the charge, they are precluded from now attacking it by Rule 51 of the Federal Rules of Civil Procedure, which states that, "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict * * *".

In any event, petitioners do not attempt to show that the charge was prejudicial to them, but merely suggest the "possibility" that the jury might have returned a different verdict had it been charged differently (Pet. 8).[1] This conjectural possibility affords no basis for overturning the verdict. It is true that since the 1949 Act imposes liability for fraudulent schemes in connection with the "procurement, transfer, or disposition" of surplus property, while the 1944 Act reaches only schemes involving the "disposi-

[1] For the same reason, the Court of Appeals correctly refused to consider the contention, here repeated (Pet. 10-11), that the government was required to prove the extent of the non-veteran's interest in the business. Pertinent regulations provided that, where a veteran was in business with a non-veteran, the veteran could obtain surplus property only if he had more than a 50% interest in the capital or profits of the enterprise. The trial court instructed the jury that the extent of the non-veteran's interest in the enterprise was immaterial, since there was no contention that any persons were associated with the veterans in their alleged steel businesses (R. 5321) and petitioners did not object to the instruction. Moreover, the instruction was clearly correct in view of the government's theory that the veterans were not engaged in the steel business at all, but were mere agents of Solomon.

tion" of such property (*supra*, pp. 2, 3), there might in some cases be liability under the former although not under the latter. But this is not such a case. For here, as the Court of Appeals pointed out (Pet. 24, emphasis in original), "[t]he illegal conspiracy was not one to *dispose* of government property. It was a conspiracy to *obtain* government property *in connection with* its disposition by the Government under the Act." In this case, therefore, the difference between the standards under the two Acts is immaterial. In any event, petitioners have pointed to no evidence that these conspiracies related to anything other than the *disposition* of property.

2. STATUTE OF LIMITATIONS

This Court recently held that since Section 26 of the Surplus Property Act provides for a civil remedy rather than a penalty (*Rex Trailer Co.* v. *United States*, 350 U.S. 148), the five-year statute of limitations in 28 U.S.C. 2462 upon suits "for the enforcement of any civil fine, penalty, or forfeiture" is not applicable to suits under Section 26. *Keller* v. *United States*, 359 U.S. 309. Petitioners urge (Pet. 8-9), however, that this rule applies only to proceedings under Section 26(b)(1), which provides for liquidated damages of $2,000 for each transaction and double the damages sustained, and not to proceedings under Section 26, which provides for liquidated damages of "twice the consideration" agreed to be paid for the surplus property. But Section 26(b) contains three "alternative remedies" which are "*in pari materia*."

[illegible]

and exhibits "of the same nature and designed to serve the same purpose." *Rex Trailer, supra*, pp. 151–152. Relying on these considerations, the Court of Appeals correctly refused to apply different limitations periods to these interrelated alternative remedies.

3. EFFECT OF REPEAL OF THE 1944 ACT

Petitioners argue (Pet. 7, 11–12) that the United States had no right to bring this action because most of the 1944 Act, including Section 20, was repealed by the 1949 Act. However, they ignore the effect of the general savings statute in 1 U.S.C. 109, which treats an act that is repealed as remaining in force for the purpose of enforcing liabilities which arose thereunder. *De La Rama Steamship Co. v. United States*, 344 U.S. 386; *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 553–555. *Great Northern Ry. Co. v. United States*, 208 U.S. 452, upon which petitioners rely, does not help them. There, even though the reenactment did accomplish a substantial revision of the prior statute, it was held that a suit could still be maintained under the former statute because Congress had not evidenced a design to forgive liabilities arising thereunder. The situation here, involving substantial reenactment, follows *a fortiori*.

4. APPLICABILITY OF SECTION 20(b)(2) TO INTRASTATE TRANSACTIONS

Petitioners contend (Pet. 10) that Section 20(b)(2), which permits recovery of twice the consideration received to be paid, applies only to executory, and not to executed, transactions. But the broad language of the statute makes no such distinction, and to the contrary, it gives the government three alternative

brought in 1947, the government was aware that petitioners had demanded it. Thus, even assuming that the mutiny suit and the O.P.A. suits involved "inconsistent rights," it is clear that the institution of the latter did not bar the former.

ALLEGED IMPROPER VARIANCE BETWEEN JURY VERDICT AND JUDGMENT

Petitioners further claim (Pet. 12-16) that they were denied their constitutional right to trial by jury because the trial court entered judgment against them jointly and severally, although the jury verdict fixed their liabilities only severally. But it is clear that the trial court action was proper, and involved no denial of petitioners' constitutional rights.

As noted *supra*, p. 3, the trial court instructed the jury to state separately in its verdict the individual liability of each petitioner. The jury's verdict fixed the liability of each of the three veterans separately, and fixed the liability of the non-veteran Solomon in an amount equal to the sum of the veterans' liabilities. The jury verdict obviously was not the final judgment against petitioners; as the Court of Appeals pointed out (Pet. 26), "[t]he separate verdicts in this case are merely factual findings." Since conspirators are jointly and severally liable, the trial court was fully warranted in using the jury's findings as to petitioners' individual liabilities to enter a judgment that imposed such liabilities jointly and severally.

7. DENIAL OF REHEARING EN BANC

Finally, petitioners suggest (Pet. 16) that the denial of their petition for rehearing *en banc* by a three-judge panel rather than by the full Court of Appeals, was not "in compliance with" *Western P. R. Corp.* v. *Western P. R. Co.*, 345 U.S. 247. *Western* expressly stated, however, that the statute governing rehearings *en banc* (28 U.S.C. 46(c)) "should not be construed to compel the court to entertain, *en banc*, motions for a hearing or rehearing *en banc*" (p. 258); that a court of appeals may "entrust * * * the initiation of a hearing or rehearing *en banc* to the three judges who are selected to hear the case" (p. 259); and that the court has "wide latitude of discretion" in adopting a procedure governing hearings *en banc*. See also *United States* v. *American Foreign S.S. Corp.*, 1959 Term, No. 138, decided June 20, 1960, slip opinion, p. 4.

The practice followed by the court below for some years has been that petitions for rehearing are considered by a regular panel of three judges, and will not be considered by the court *en banc*; and the Sixth Circuit has clearly announced this rule for the benefit of the bar, and has stated that it "was established after full consideration by a majority of the Circuit Judges of this Circuit in active service." *Northwest Airlines, Inc.* v. *Glenn L. Martin Company*, 229 F. 2d 431 (C.A. 6), and the cases cited in the clerk's letter to petitioners (Pet. 29). This is all that the *Western* case requires.

CONCLUSION

The decision of the Court of Appeals is clearly correct. None of the questions raised by petitioners as to which this Court has not spoken is of general importance, nor is there any conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1960.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 1353

CHARLES B. SOLOMON, AVERY TUCKER, MARTIN WESTON and JOSEPH B. MOHR,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' PETITION FOR REHEARING

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INDEX TO AUTHORITIES CITED

Cases

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Bay Trader Co. v. United States, 250 U. S. 418
United States v. Houghton, 66 C. A. 90, 270 F. (2d) 290, cert. granted 361 U. S. 508

Statutes

Rules and Regulations Implementing Title II, Public Contracts (41 U. S. C. A., Cum. Supp.) Section 1-1.315-2 (c)
Surplus Property Act of 1944, 58 Stat. 765, 50 U. S. C. A. Appendix, 1946 ed., section 1633 (d) (1) and (2)

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Respondent

PETITIONERS' PETITION FOR REHEARING

Petitioners request reconsideration of their Petition For Writ of Certiorari. The present argument is addressed primarily to the question: Does the Surplus Property Act of 1944, 58 Stat. 765, 50 U.S.C.A. Appendix, 1946 ed.,

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Petitioners' further arguments on this application for rehearing, based upon *United States v. Hamilton*, (C.C.A. 9), 271 F. (2d) 200, cert. granted, 361 U.S. ..., have been abandoned in view of this court's decision reversing that case, ... L. ed. 21 ..., in advance sheets issued today.

section 1635 (b) (2) provide a penalty rather than liquidated damages?

This Court in *Rex Trailer Co. v. United States*, 350 U. S. 148, held that the $2000 recoverable under section 1635 (b) (1) was liquidated damages and bottomed its decision on the provisions relating to building contracts under 40 U. S. C. A. section 269 (now embodied in Title 41 U. S. C. A.). In this regard Congress has laid down Rules and Regulations in implementing Title 41, Public Contracts (41 U. S. C. A., Cum. Supp.) Section 14.315-2 (c) of these rules provides**:

> "The rate of liquidated damages stipulated must be reasonable in relation to anticipated damages, considered on a case-by-case basis, since liquidated damages fixed without any reasonable reference to probable damages may be held to be not compensation for anticipated damages caused by delay, but a penalty, and therefore unenforceable."

We thus have the clearly expressed intention of Congress and its policy that liquidated damages must have some reasonable relation to probable actual damages. In the case at bar the damages arbitrarily exacted were over $142,000,000, twice the amount paid for the goods, all without any proof of actual damages.

Section 1635 (b) (2), unlike section 1635 (b) (1), is not an off-shoot of the False Claims Act. (*See Rex Trailer Co. v. United States*, *supra*, at p. 152, footnote 4.) It is an entirely new provision and cannot, therefore, be said to assimilate the purpose and intent of the False Claims Act.

** [illegible] has not been

The recent decision of this Court in *United States v. Hazeltine*, 5 L. Ed. 2d 8, holding that section (b)(2) is applicable to cash sales as well as to sales on credit necessarily supports our contention. Since under that ruling, the person who has paid cash can be compelled to pay twice more, making threefold in all, and the person who has purchased on credit need pay only twice, the conclusion is inescapable that the amount of recovery has no relation whatsoever to probable damages but is purely *penal*. Indeed it may well be urged that this interpretation of section (b)(2) decrees different amounts of damages for precisely similar acts and thereby creates such an arbitrary and unreasonable classification as to be violative of the Fifth Amendment to the Constitution of the United States. See *De Veau v. Braisted, Collector of Internal Revenue*, 363 U. S. 144, 160.

We respectfully conclude that Congress by its declared policy, as quoted above, has firmly adhered to the traditional principles regarding liquidated damages. To hold now that section (b)(2) is not a penalty would be directly violative of the unequivocal expression of Congress. Consistently with that expression the court should construe section (b)(2) as "a penalty, and therefore an enforceable" without proof of actual damages. Judicial construction of the most liberal nature cannot make an enlargement which Congress has indicated is unwarranted.

Respectfully submitted,

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GEORGE STONE,

Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

The foregoing petition for rehearing is presented in good faith and not for delay, and the petition is restricted to the grounds above specified.

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GEORGE STONE,

Counsel for Petitioners.